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No. 84-1278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WAYNE J. YAMASAKI,
DIRECTOR, HAWAII DEPARTMENT OF TRANSPORTATION,
Petitioner,

v.

STOP H-3 ASSOCIATION, a Hawaii non-profit corporation, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. FACTUAL CLARIFICATIONS.

As respondents[1] correctly note, they have prevented the highway which is the subject of this petition from

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[1] Federal respondents in their Memorandum In Opposition do not defend the validity of the Court of Appeals' decision. Indeed, they concede that the Court of Appeals "may well have exceeded

being built for 13 years. (Br. Op. p. 9) The balance of their Statement of the Case, however, is filled with inaccuracies, some of the more important of which compel correction:

> H-3 is not a spur line off of H-1, but would connect two major trip-generating areas, and would be the only trans-Koolau route designed and built to Interstate freeway standards.
>
> In the Department of Defense's April 1982 *Interstate Completion Study,* as opposed to the outdated 1981 study respondents cite, H-3 is classified as "Defense important . . . serving defense installations . . . traversing topographic barriers."
>
> There is a short windward segment of H-3 which can be linked to Kamehameha Highway. Petitioner moved twice in the District Court, once in 1974 and once in 1976, to permit this connection. Respondents opposed the linking up each time. No such understanding as that alluded to by respondents (Br. Op., pp. 5-6) appears on the record.
>
> The flood control project which was to become Ho'omaluhia Park came nowhere near H-3 in its

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the permissible scope of judicial review". (Memo. Opp., at 2), and "believe there is a substantial basis for petitioner's contention (Pet. 14-18) that the Court of Appeals has blurred the line separating proper judicial review from interference with administrative discretion and informed decision making." (Memo. Opp., at 3) This is not surprising, as Federal respondents defended the Secretary of Transportation's action in the District Court and urged in the Court of Appeals that the District Court's judgment be affirmed. As to the utility of resupplementing the administrative record, see Part III, p. 5 below. Because Federal respondents agree with Petitioner as to the overreaching nature of the Court of Appeals' judgment, the remainder of this Reply Brief will discusss the arguments advanced by respondents to uphold that judgment.

original form. Only after H-3's alignment was finalized did the flood control project evolve into a park. Only then did the park expand its boundaries twice to meet H-3, swallowing up in the process the buffer strip between H-3 and the park. The jurisdiction controlling the park, the City and County of Honolulu, chose to forego the buffer strip to prevent any development between the park and H-3. The park was not opened until 1982.

II. THE SECRETARY CORRECTLY CONSIDERED THE HISTORY BEHIND H-3 AND THE PARK IN DETERMINING THAT NO FEASIBLE AND PRUDENT ALTERNATIVE EXISTED TO BUILDING H-3 AROUND, BUT NOT THROUGH, THE PARK.

The Secretary considered the history of joint coordination and planning for H-3 and Ho'omaluhia Park in making the Section 4(f) determination. As the District Court noted "the park design took into account the potential impacts of the freeway . . . landscaping and other measures are designed to visually shield the park from the highway." (Pet. App. 107a)

In the case of *A.C.O.R.N.* v. *Brinegar,* 398 F. Supp. 685 (E.D. Ark. 1975), *aff'd, A.C.O.R.N.* v. *Coleman,* 531 F.2d 864 (8th Cir. 1976), two parks were at issue, one of which expanded to meet a proposed highway in the same manner as did Ho'omaluhia Park:

> Moreover, the defendants did not locate the route of the project along the north border of Kanis Park; the park was located by the City after the route of the freeway had been determined and with full knowledge and expectation that the freeway would be built along the line now contemplated. Thus, it may fairly be said that the City

> is making a constructive use of the freeway to improve access to the park rather than that the defendants are about to make a constructive use of the park.

Ibid., 398 F. Supp. at 693.

Similarly, the Eighth Circuit, in *Citizens to Preserve Wilderness Park* v. *Adams*, 543 F. Supp. 21 (D. Neb. 1981), *aff'd*, 685 F.2d 438 (8th Cir. 1982), was correct in concluding that administrative decision-makers need not disregard common sense and wisdom in making Section 4(f) determinations:

> If that were so, the taking of seventeen houses and thirty houses or the severing of a school district or the impinging on a mental hospital or any other factor or collection of factors would have a fixed weight, the same whether a highway would cut a park in two or brush its edge, or swallow up the heartland of Central Park in New York or Brackenridge Park in San Antonio or Overton Park in Memphis . . . neither the Act of Congress, nor the legislative history, nor the Supreme Court of the United States in *Overton Park, supra,* says that in deciding whether an alternative route is prudent it matters not a whit whether the alternative is an alternative to the taking of a square inch or a square mile. Neither does any say that all parkland must be pretended to have the same quality. In the greater scheme of things it cannot be so, not in exercising "discretionary" authority with "wisdom and reason." [Footnotes omitted.]

Ibid., 543 F. Supp. at 27-28.

III. THE COURT SHOULD NOT CONDONE THE MISCHIEVOUS CONSEQUENCES OF THE COURT OF APPEALS' DECISION, FOR IF THE DECISION IS UPHELD, IT WILL DOOM FUTURE JOINT PARK AND HIGHWAY PLANNING EFFORTS.

It is no answer to the problems raised by the Court of Appeals' decision to suggest that the administrative record here can be resupplemented (Memo Op., at 3-4). Nor can those problems be dismissed by suggesting that the facts of this case have never appeared before and will never appear again (Br. Op. at 11-13).

For while the record concededly does not reveal any other highway being enjoined in the past because of its co-location with a park, if the Court of Appeals' decision stands, that situation will most assuredly never arise again. Be it a highway or mass transit system (*Philadelphia Council of Neighborhood Organizations* v. *Coleman,* 437 F. Supp. 1347 (E.D. Pa. 1977), *aff'd,* 578 F.2d 1375 (3rd Cir. 1978)) or airport (*Sierra Club* v. *Department of Transportation,* 753 F.2d 120 (D.C. Cir. 1985)), the spectre of Section 4(f) litigation will render it difficult for the proponents of a transportation project to countenance any joint development of a park or wildlife refuge, or designation of an historic site. With no such joint planning and development, this situation will certainly not arise again. Resupplementation of the record would be pointless, as the Court of Appeals did not indicate that the Secretary's recognition of the joint development of H-3 and the park was unsupported by the record. Resupplementation would serve no productive purpose.

This Court should find that the Court of Appeals erred in ignoring joint development of a transporta-

tion facility and a park where Congress provided in Section 4(f):

> [S]pecial effort should be made to preserve the natural beauty of the countryside. . . . The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands traversed.

IV. CONCLUSION.

For the reasons stated herein, the petition for certiorari, and the brief *amicus curiae* of Committee for H-3 and Pacific Legal Foundation, a writ of certiorari should be granted.

Respectfully submitted,

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